







IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA,

Petitioner,

vs.

**IN RE SEPTEMBER 1971 GRAND JURY,
RICHARD J. MARA, a/k/a RICHARD J. MARASOVICH,**

Respondent.

**On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit**

BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT.

The witness appeared pursuant to subpoena before the September, 1971 Grand Jury, in the Northern District of Illinois on September 23, 1971. He was directed by the United States Attorney to give handwriting and printing exemplars to an F.B.I. agent. Upon his refusal to do so he was instructed to obtain the services of counsel and

return on September 28, 1971. On September 28, he appeared with counsel and was again directed to give handwriting exemplars to an F.B.I. agent. Upon his refusal to do so, the United States Attorney directed the foreman of the Grand Jury to instruct the witness to give handwriting exemplars to an F.B.I. agent. The Petition for order seeking exemplars filed in the District Court stated that respondent was a potential defendant and that the exemplars were wanted solely as a standard of comparison in order to determine whether the witness is the author of certain writings. Neither the witness nor counsel were allowed to look at the F.B.I. Affidavit.

The witness appealed from the order of incarceration and raised the following points before the Circuit Court of Appeals:

1. Whether the order below violates the witness' rights under the Fourth Amendment as to privacy without probable cause.
2. Whether the order is a violation of witness' Fourth Amendment rights as being an unreasonable seizure.
3. Whether the order violates witness' privilege of self incrimination under the Fifth Amendment.
4. Whether the order violates witness' right to due process under the Fifth Amendment.
5. Whether the order violates witness' right to counsel under the Sixth Amendment.
6. Whether the government had authority to direct the Grand Jury to order the witness to give exemplars to a Government Agency, i.e. Federal Bureau of Investigation.

7. Whether the Government had authority to direct the witness to give exemplars to a government agency, i.e., Federal Bureau of Investigation.

8. Whether the order violates witness' rights under the Fourth and Fifth Amendments when based on Affidavits inspected in camera and not shown to witness nor his counsel.

QUESTIONS PRESENTED.

1. Whether the Government can compel a witness, by use of a Grand Jury subpoena, to submit handwriting and printing exemplars, to the Government and force compulsion, based upon an FBI Affidavit submitted *in camera* to a district Court without allowing a witness or counsel to see said affidavit, where the information contained in the affidavit did not emanate from any independent activity before that body.
2. Whether the Fourth and Fifth Amendments forbid such an abuse of the Grand Jury process.

REASONS FOR DENYING THE WRIT.

This case presents not only questions concerning the proper application of the Fourth Amendment to the Grand Jury process but also the abuse of the Grand Jury process by the Government bringing into play the due process and self incrimination clauses of the Fifth

Amendment. This case deftly illustrates the persistent proclivity of the Government by sundry means to subvert the rights of individuals guaranteed to them under the U.S. Constitution. Government probes, by the use of different plays, that document until it finds what it thinks is a soft underbelly. The methods used are ingenious.

In *Hill v. Philpott*, 445 F. 2nd 144, 7 Cir., (1970) the government sought a citizen's personal books and records by way of a search warrant. Its position was that once the validity of a search was established, the Fifth Amendment was not violated. The Government did not proceed by way of summons knowing full well that the Fifth Amendment applied. The Appeals Court rejected the Government's argument and ruled that obtaining a search warrant would not invalidate the Fifth Amendment.

In *re Dionisio*, 442 F. 2nd 276, 7 Cir., (1971), which is before this Court, the Appeals Court on Fourth Amendment grounds ruled that voice exemplars were not required to be given to a grand jury.

In *U. S. v. Baily*, 327 F. Supp. 802, N.D. Illinois (1971), the Government sought handwriting exemplars solely because an indictment had been returned as the showing of probable cause. The Court held that this was not sufficient and that what the Government sought was a fishing expedition. Lastly, in the instant case, the Government, by issuing a Grand Jury subpoena, seeks exemplars and incarceration, by an in camera affidavit by an F.B.I. agent which the witness cannot see nor refute.

Invoking the sanctity of the Grand Jury does not give the Government the right to violate the Fourth and Fifth Amendments nor the right to abuse the Grand Jury pro-

ess. The facts in Mara are unlike any in the cases cited by the Government or respondent. Respondent submits that on the facts as presented, Mara operates in a vacuum. The Government, by submitting an affidavit in camera, says the giving of exemplars is reasonable. Page 6 of the Government's petition states that the Fourth Amendment is satisfied by an ex parte, in camera proceeding, before a magistrate, analogous to Fourth Amendment situations where a search warrant or arrest warrant is sought. In a search warrant or arrest warrant procedure, the defendant can attack the validity of the affidavit. (See *U. S. v. Suarz*, 380 F. 2nd 713, 2 Cir., (1967), *U. S. v. Gillette*, 383 F. 2nd 843, 2 Cir. (1967), *U. S. v. Roth*, 391 F. 2nd 507, 7 Cir., (1967), *Rugendorf v. United States*, 376 U.S. 528 (1964), *Aguilar v. Texas*, 378 U.S. 108 (1964), *Spinelli v. United States*, 393 U.S. 410 (1968), Rule 41, Criminal Rules of Criminal Procedure).

Rule 41 provides that a warrant shall issue upon a sworn Affidavit establishing the grounds that there was probable cause. The Government's position, that an *ex parte in camera* proceeding is sufficient to meet the requirements of the Fourth Amendment, is spurious. By their own analogy, probable cause must be established by affidavit and thus the affidavit may be attacked on a motion to quash the search or the arrest. Here the Government has consistently refused to allow the Affidavit to be seen; by its own admission, states that the affidavit submitted by the F.B.I. is based upon suspicion, and for that reason seeks comparison of handwriting and printing exemplars. That there has been no probable cause for a warrant is indicated by the very fact that there

has been no indictment of the witness. It is not known upon what reasoning or theory the Government seeks to justify its position except that it wishes to seek exemplars by the use of a Grand Jury subpoena. As stated, the Grand Jury is not sacrosanct. As set forth in *Davis v. Mississippi*, 394 U.S. 721 (1969), nothing is more clear that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrest" or "investigatory detentions." *Davis* did not distinguish between Grand Juries or police actions, but directed its teachings to the Fourth Amendment and what that Amendment prevented Government from doing.

Furthermore, it is not reasonable nor adequate to sustain the position taken by the Government. (See *U. S. v. Praigg*, 336 F. Supp. 480 (1972) USDC CD Calif. and *In the Matter of Grand Jury; Riccardi, witness*; USDC NJ 10 CRL 2465 (1972)).

In *U. S. v. Doe*, No. 663, 2nd Cir., 1972 the Government submitted an affidavit stating that witnesses before the Grand Jury had indicated that there were resemblances between the handwriting on certain exhibits and what they believed to be that of the witness and that efforts to obtain specimens of the witness' handwriting had been unsuccessful. In the Opinion which is set forth in full in the Government's Supplemental Memorandum, the Government used the following language on page 15:

"The prosecutor's affidavit that witnesses before the Grand Jury had indicated resemblances between Cynthia Schwartz' handwriting and material pieces of evidence in the Grand Jury's fraud investigation, and that definitive exemplars of her handwriting could not be otherwise obtained, would suffice to

meet whatever slight burden of making a preliminary showing the Government might have under any view."

The Government cites the *Doe* case in support of its argument, but clearly that Court supports the finding of the Seventh Circuit Court of Appeals in the instant case.

The procedure complained about violates not only the Fourth Amendment, but the due process clause of the Fifth Amendment, i.e., to incarcerate a man based upon something he cannot see or question. This is a practice which has never before been presented, under the guise of a grand jury, and it should not be countenanced by this Court. To allow so patent a device is to effectively give weight to the cry that a police state is what we live in today. For a Government can then get information it seeks by the issuance solely of a Grand Jury subpoena, on suspicion alone, and compel a witness to divulge anything the Government desires. There would thus be no effective barrier to Government in that the Fourth and Fifth Amendments would effectively be reduced to shambles.

Additionally, more and more Grand Juries have become rubber stamps for the Government in obtaining information. In the instant case it is the Government who is directing what the witness is to do. No one quarrels with the law as stated with reference to a Grand Jury. But a Grand Jury is independent and supposed to stand between the accuser and the accused. (*In re April 1956 Term Grand Jury*, 239 F. 2nd 263, 7 Cir. (1956)). A Grand Jury cannot act independently when the accuser is directing witnesses what to do and instructing the Grand Jury how to act. This is an abuse of the Grand

Jury process and what occurred in this case. What is sought is not a limitation of the Grand Jury power, only that it act independently and within the confines of the Constitution.

U. S. v. Doe, 663, 2nd Cir. (1972), cited by the Government in its supplemental memorandum, recognized that a Court is not without power to act when a grand jury oversteps its bounds and that a Grand Jury is supposed to act as a protective buffer between the accused and the prosecutor.

The obtaining of exemplars, if testimonial are within the purview of the Fifth Amendment. If the content of the exemplar is sought and thus testimonial, the Fifth Amendment prohibits the giving of it. (*Schmerber v. California*, 384 U.S. 757 (1966), *Gilbert v. California*, 388 U.S. 263 (1967), speak of giving non-communicative evidence for identification only. Both cases indicate that evidence, testimonial in nature, falls within the Fifth Amendment privilege. (See *U. S. v. Green*, 282 F. Supp. 373 (1968), *U. S. v. Irwin*, 322 F. Supp. 701 (1971), *In the Matter of Grand Jury; Riccardi, witness*; USDC NJ 10 CRL 2465 (1972)).

In *Doe*, the Court decided that the witness therein was not directed to produce anything that was testimonial in nature.

CONCLUSION.

For the foregoing reasons it is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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